United States District Court

Eastern District of California

Nathaniel Brown,

Plaintiff, No. Civ. S 04-0477 DFL PAN P

vs. Findings and Recommendations

Sacramento County Sheriff Department, et al.,

Defendants.

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Plaintiff filed this action as a state prisoner without counsel; he subsequently was released from incarceration. Plaintiff claims Sacramento Sheriff Deputies Prehoda and Randonjic violated his civil rights when they used excessive force to arrest him on April 9, 2003.

Defendants moved April 22, 2005, for summary judgment. Plaintiff did not oppose.

Standard on Summary Judgment.

A party may move, without or without supporting affidavits, for a summary judgment and the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a)-(c).

An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). A fact is "material" if it affects the right to recover under applicable substantive law. Id. The moving party must submit evidence that establishes the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corporation v. Catrett, 477 U.S. 317, 322 (1986). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any'" that the moving party believes demonstrate the absence of a genuine issue of material fact. Id., at 323. If the movant does not bear the burden of proof on an issue, the movant need only point to the absence of evidence to support the opponent's burden. To avoid summary judgment on an issue upon which the opponent bears the burden of proof, the

opponent must "go beyond the pleadings and by her own affidavits, or by the "'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id., at 324. The opponent's affirmative evidence must be sufficiently probative that a jury reasonably could decide the issue in favor of the opponent. Matsushita Electric Industrial Co., Inc. v. Zenith Radio Corporation, 475 U.S. 574, 588 (1986). When the conduct alleged is implausible, stronger evidence than otherwise required must be presented to defeat summary judgment. Id., at 587.

Fed. R. Civ. P. 56(e) provides that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Nevertheless, the Supreme Court has held that the opponent need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Celotex, 477 U.S. at 324. Rather, the questions are (1) whether the evidence could be submitted in admissible form and (2) "if reduced to admissible evidence" would it be sufficient to carry the party's burden at trial. Id., at 327. Thus, in Fraser v. Goodale, 342 F.3d 1032 (9th Cir. 2003), objection to the opposing party's reliance upon her diary upon the ground it was hearsay was overruled because the party could testify to all the relevant portions from personal knowledge or read it into evidence as recorded recollection.

A verified complaint based on personal knowledge setting forth specific facts admissible in evidence is treated as an affidavit. Schroeder v. McDonald, 55 F.3d 454 (9th Cir. 1995); McElyea v. Babbitt, 833 F.2d 196 (9th Cir. 1987); see also Johnson v. Meltzer, 134 F.3d 1393 (9th Cir. 1998); Jones v. Blanas, 393 F.3d 918 (9th Cir. 2004).

Application.

In his verified complaint, plaintiff, who is black, states that he ran as Prehoda chased him on foot but then stopped running and got down on the ground. Plaintiff states Prehoda used racial epithets and beat him with a baton on the face and head for about 10 minutes while plaintiff neither resisted nor struggled. Randonjic joined Prehoda's attack and the officers kicked plaintiff in the testicles, head and ribs. They sprayed pepper spray over plaintiff's open wounds then hosed him with water, causing additional pain. Defendants destroyed plaintiff's bloody clothes so they could not be used as evidence. Plaintiff claims defendants Prehoda and Randnojic violated his rights under the Fourth and Eighth Amendments and the due process clause of the Fourteenth Amendment and committed state torts of assault and battery and negligence. Plaintiff claims defendant Sacramento County Sheriff's Department is liable for inadequate supervision, training and control of its officers.

Defendants meet their moving burden of establishing they are entitled to summary judgment on Eighth Amendment and Fourteenth Amendment claims, as a matter of law, because plaintiff was not a

convicted prisoner or a pretrial detainee at the time of the attack. They also meet their moving burden on tort claims based on plaintiff's failure to comply with the California Tort Claims Act. The Sheriff's Department establishes it is entitled to summary judgment under Monell v. Department of Social Services, 436 U.S. 658 (1978). Plaintiff fails to oppose and defendants have earned summary judgment on each of these claims.

The excessive force claim is governed by Graham v. Conner, 490 U.S. 386 (1989). Claims that law enforcement officers used excessive force in seizing a free citizen are analyzed under the "objective reasonableness" standard of the Fourth Amendment. 490 U.S. at 396. In applying the test of reasonableness a court must give heed to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. The issue of reasonableness may be decided as a matter of law if, in resolving all factual disputes in favor of the plaintiff, the officer's force was "objectively reasonable" under the circumstances. Jackson v. City of Bremerton, 268 F.3d 646, 651 n. 1 (9th Cir. 2001); Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994).

Defendants present uncontested evidence that Prehoda pulled plaintiff over because the truck plaintiff was driving had a broken tail light and no rear license plate and that plaintiff repeatedly disregarded Prehoda's orders and fled on foot,

fighting off Prehoda twice and resuming flight. See Prehoda Decl. paras. 1-6. Prehoda finally caught up with plaintiff, wrestled him to the ground and ordered him to stop fighting. Id. paras. 7-11. Prehoda did not know whether plaintiff had any weapons. Id. para. 12.

Defendants also submit evidence plaintiff continued to struggle and Prehoda and Randonjic used only the degree of force necessary to subdue plaintiff and place him in handcuffs. This evidence is controverted by the verified complaint which states defendants beat plaintiff for 10 minutes while he was not resisting. Medical records submitted on summary judgment are consistent with either scenario.

Defendants point out that plaintiff failed to respond to requests for admission they served on him in February 2005 (viz., "admit . . . you did not obey the officer's command to get down and stop fighting," "admit that after the officer sprayed you with the pepper spray you continued to fight and struggle with the officer to get away," "admit that after you were handcuffed . . . you continued struggling"). The failure to respond to a request for admission under Fed. R. Civ. P. 36 results in an automatic admission of the matters requested; the admission is self-executing and can be used as evidence in support of summary judgment. Federal Trade Comm. v. Medicor LLC, 217 F. Supp. 2d 1048, 1053 (C.D. Cal. 2002); United States v. Kasuboski, 834 F.2d 1345, 1349 (7th Cir. 1987); American Auto. Ass'n v. AAA legal Clinic of Jefferson CrOoke, P.C., 930 F.2d 1117, 1120 (5th Cir.

1991).

Any matter admitted under Rule 36 is "conclusively established" unless the court on motion permits withdrawal or amendment of the admission. Plaintiff fails to oppose summary judgment or otherwise move for withdrawal or amendment of his admissions. Nevertheless, the matters admitted do not justify the degree of force used by defendants, as alleged in the complaint.

Accordingly, the court hereby recommends defendants' April 22, 2005, motion for summary judgment be denied.

Pursuant to the provisions of 28 U.S.C. § 636(b)(l), these findings and recommendations are submitted to the United States District Judge assigned to this case. Written objections may be filed within 20 days of service of these findings and recommendations. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The district judge may accept, reject, or modify these findings and recommendations in whole or in part.

Dated: January 24, 2006.

/s/ Peter A. Nowinski
PETER A. NOWINSKI
Magistrate Judge